**Property, Professor Singer SPR 2012**

**TRESPASS**

**A trespass is an unprivileged intentional intrusion of property possessed by another. Intent requires only a voluntary act of entry, not intent to violate property rights. A trespass is privileged when there is consent from the owner, when the entry is done out of necessity to prevent greater harm, or when the entry is encouraged by public policy** i.e. to stop a crime.

Remedies for trespass include damages, which can be nominal, compensatory, or punitive; am injunction to stop the trespass; or a declaratory judgment to assert the legal rights to the property.

*State v. Shack* (1971) NJ. Defendants are accused of trespass when they enter a farmer’s land to provide information about legal rights in a federal aid program to migrant workers living and working on the farm. The farmer claimed that he had the right to exclude the defendants based on his property rights but the court ruled that his rights could not allow him to deny the migrant workers their basic rights or hinder their well-being and receipt of government aid. The court recognized the migrant workers as a marginalized community that needed aid more than the farmer needed to assert his property rights.

🡪*State v. Shack* interprets the common law meaning of trespass as it is used in a criminal statute. The preliminary discussion of the constitutional rights of the migrant workers is dismissed because the trespass discussion will actually provide more protection of rights in more cases.

🡪There is a strong public policy argument here that these actions for the rights and needs of the migrant workers are more important than the private property right to exclude of the farm owner.

*Desnick v. American Broadcasting* (7th Cir. 1995). Court rules that there is no trespass when ABC did an undercover investigation of the Desnick Eye Center by secretly filming the store and its corrupt practices. The journalists posed as patients to get the story. The court found that even though the journalists gained entry through fraudulent misrepresentation, no property rights were violated—the doctor-patient privilege wasn’t implicated, the goings-on of the office weren’t disturbed, there was no theft intended, and there were no demonstrations. There was consent so that means there was no trespass.

🡪This case could be seen to be decided on issues of consent, scope of consent, or public policy i.e. discrimination in housing.

Trespass to chattel applies to personal property rights. Mere touching of property is not sufficient but actual injury must be shown or some intentional intermeddling.

*Uston v. Resorts International* (1982) NJ. Court rules that a card-counter cannot be legally excluded from a casino solely because he counts cards. There is no rule from the gaming commission that bars the practice of card counting. **The casino is a public place and they only have the right to exclude persons “reasonably” i.e. someone who threatens security or disrupts casino operations**. The card counter doesn’t fulfill that description so he cannot be excluded. In effect, the patron’s right to reasonable access to public accommodations trumps the casino owner’s right to exclude persons.

🡪NJ is a minority rule and in most states business owners have an absolute right to exclude and only innkeepers or common carriers must serve the public according to the reasonable access rule.

*Civil Rights Act of 1964*. This Act requires equal access to places of public accommodation (no discrimination on basis of color, race, national origin, or religion). Public places include inns, hotels, restaurants, eateries, theaters, stadiums, and areas of entertainment. Private establishments are not covered. In federal court, the remedies are injunctions or declaratory judgments only—no damages.

*Civil Rights Act of 1866*. This covers the general right to make contracts, sue, give evidence, be protected by laws across states. It prohibits race discrimination. Damages are available under this Act.

🡪The right to make contracts has been interpreted to mean a right to enter a store or other service provider. However, most courts have not found that harassment or other deterrence from making a contract (purchase) is a violation of the act i.e. making derogatory racial statements, following black customers, etc. is not found to be a violation.

🡪There is a question of how much force the 1866 Act has given the more specific limitations of the 1964 Act (application to private establishments in particular).

🡪A private club is determined by its selective criteria and whether it is limited in size. If the selection criteria is a statutory category (race, sex, etc.), it is probably not a private club but a public accommodation.

Paternalism is the idea that an entity or individual will decide what is in your best interest and induce you to act accordingly. It’s work here but in the opposite way—it requires paternalism to regulate this situation to ensure the migrant workers’ rights.

Think about the idea that the migrant workers have the same rights to receive their visitors as the farm owner has to exclude them: privacy safety, enjoyment, protection.

*Glavin v. Eckman* (2008) Mass. The Eckmans wanted to clear some trees that hindered their view of the ocean. Their neighbors, the Glavins, refused the request but the Eckmans called a contractor to have the trees cleared anyway and then tried to claim that they had no responsibility when the contractor cut the trees down. The Glavin sued the contractor and the Eckmans and the court found them both liable. The jury awarded restoration damages of $30,000 which the judge tripled according to state statute. The damages were found to be proper given that the diminution of value or the value of the timber would not be just compensation for the harm incurred. (The Glavins had plans to install a shade pond under these trees (the trees were mature) and now that possibility was lost forever.)

*Jacque v. Steenberg*. Punitive damages are appropriate for bad conduct in a trespass even when no damage to the property is done.

🡪Singer believes that the historical rule limiting damages to a nominal award of $1 is no longer sufficient to redress the harm done by a trespass

**COPYRIGHT LAW**

This is regulated by federal law only—The Copyright Act. The protection of this law extends to “original works of authorship,” that are “fixed in any tangible medium of expression,” to include literary works, music, drama, pictures, sound, movies, architecture, pantomimes, and choreography. It does not extend to ideas, processes, procedures, systems, concepts, principles, or discoveries regardless of their protected form.

The copyright owner retains the exclusive rights to reproduce, prepare derivative works, distribute copies by sale/rental/lease/lending, perform, and display the work.

There is however a ***fair use exception*** to these exclusive rights. To constitute fair use, factors include the purpose of the use (i.e. for nonprofit educational purposes), the nature of the copyrighted work, the amount of the work used (in whole or in part), and the effect of this use on the copyrighted work’s potential future market or value.

*Feist Publications v. Rural Telephone Service* (1991) SCOTUS. Court decides that the names, addresses, and telephone numbers found in a telephone book compiled by Rural are not protected by copyright such that Feist couldn’t take the information and put it in its own book. Court believes that the alphabetical listing of the names in the book is not enough of an original approach to make it a statutorily protected “compilation.” **Facts are not copyright-able but compilations of facts are so long as there is some kind of creativity in the selection, coordination, or arrangement of those facts. The purpose of the Copyright Act is not to protect the work done to gather the information but to protect their creative or original presentation**.

🡪Here the court was interpreting the words “original works of authorship,” “idea,” and “concepts.”

Contributory infringement. An entity can be sued if their product facilitates copyright infringement. Sony was implicated in a suit over their VCRs and their potential for copyright infringement but the court sided with them, finding that the VCR had other significant legal uses and use of VCRs didn’t demonstrably affect the marketability or value of copyright owners’ works.

*MGM v. Grokster* (20005) SCOTUS. Following the *Napster* case, the court decides whether Grokster and its cousin StreamCast are liable for the rampant copyright infringement conducted by users of their software. The Court distinguished this case from the *Sony* case*.* The court believes that these two companies actively encouraged the copyright infringement activityof their patrons (targeted the market left open by Napster’s closing) whereas this was not the case in *Sony*. The court also notes that they took no active steps to stop the abuses they knew were happening on the website and that they had an economic incentive to get more of these users to their sites in order to sell more ads. They are not liable because they knew about the abuse and did nothing—**they are liable because they showed intent to actively encourage the infringement**. Also about 90% of the use was copyright infringement so there was clear evidence that the infringement was occurring.

*SunTrust v. Houghton Mifflin* (2001) 11th Cir. SunTrust owned the copyright to *Gone with the Wind* and sued Houghton Mifflin for trying to sell a new novel called *The Wind Done Gone*, a critical commentary on GWTW. It was obvious that TWDG used a number of original elements of GWTW so the question was whether it fell under the fair use exception. (1) TWDG was for commercial profit so this would suggest it did not meet the exception however it was seen as a transformative work (something new in itself—**purpose and character of the work**). (2) Parody cases are special because they work from publicly-known works (**nature of the copyrighted work**). (3) The bare minimum number of details from the copyrighted work need not be used in the other work to avoid infringement (**amount and substantiality of the proportion used**). (4) There is no evidence in the record that TWDG would jeopardize the marketability or value of derivative works of GWTW (**effect on original work’s market value**). The court believes that there are a sufficient number of original, creative elements in TWDG to justify it as fair use.

**NUISANCE**

**Nuisance suits provide remedy when another’s use of their property causes *unreasonable harm or interference* to one’s *use and enjoyment* of his property**. Either the defendant will be deemed to have a privilege to act the way that he does, or the plaintiff will win the nuisance suit and be awarded an injunction or damages.

Nuisance typically deals with activities that are physically offensive to the senses and thus make life uncomfortable i.e. noise, odor, smoke, dust, flies, etc. It also includes air pollution and other interferences caused by particulates (the latter can be either trespass or nuisance).

**A reasonableness test is used to balance factors such as** the extent of the plaintiff’s harm, the social benefits of the defendant’s conduct, the overall social costs and benefits of the conflicting property uses, the availability of alternative means to mitigate harm to the plaintiff, the defendant’s motive (spite or malice is unacceptable), and which use was establish first.

🡪Prior appropriation allows the person who established first use to continue his conduct. 🡪Right-to-farm statutes allow farmers to continue their conduct if the farm was established before the surrounding homes.

🡪There may not be a nuisance if the plaintiff is unusually sensitive or if the nuisance was established first

🡪There may be nuisance if the conduct is too great to be expected to be borne fairly (drug dealing) or if there is a reasonable use in an unreasonable location

Remedies for a nuisance suit may include (1) dismissal of the complaint (2) damages (3) injunction (4) purchased injunction (the defendant stops his behavior but the plaintiff compensates him for his lost opportunity)

*Armstrong v. Francis Corp* (1956) NJ. Francis Corp is developing homes and to do so they divert a natural stream, which becomes muddy, there is flooding, all the fish die, and there is a considerable amount of erosion at the homes of the plaintiffs. **The court rejects the old “common enemy rule”** which would allow the defendant an almost unlimited right to dispel the surface water as he pleased. **They instead institute a reasonableness test—factors to consider include the foreseeability of the harm, the amount of harm suffered, motive, and the greater social interest.** The court suggests that Francis will need to pay homeowners up-front for damage done even if there is a social good to them developing homes.

The natural flow rule or the civil law doctrine allows a plaintiff absolute security against flooding caused by the defendant’s development of his property. This strict liability rule is a minority rule and it sparks concerns about inhibiting land development.

The reasonableness test is the majority rule. The idea is that the policy and social arguments will balance the costs to be gained and lost by the proposed activity. Unlike the civil law doctrine, this rule allows for promotion of land development and competition while balancing the legitimate rights of security possessed by the landowners.

Nuisance can be distinguished from negligence based on conduct. Nuisance focuses on the results of one’s conduct whether the conduct itself was reasonably undertaken or not. If the result of the conduct was unreasonable then there is a nuisance. Nuisance also covers unforeseeable harms.

Such a things as temporary nuisance may exist. Claims would accrue for every instance of the conduct. Temporary nuisance can be resolved by the defendant changing his behavior. Permanent nuisance claims accrue from the first instance only. Permanent nuisance irreparably damages the plaintiff’s property or will continue indefinitely.

*Page County Appliance v. Honeywell* (1984) IA. Page County sold TVs and displayed some in their store window. An ITT store moved into the shop next door and installed a Honeywell computer that emitted radiation, disturbing the TV signals next door. After Honeywell tried unsuccessfully to fix the problem, Page County sued for nuisance. This court remands on new jury instructions for **the reasonableness test—it is to include the nature of the affected use or employment i.e. an unusual use unsuited to the area it is being used in is not a protected use** (for instance, a person with an outdoor movie theater in his backyard). A “***normal persons in a particular locality” standard*** is now in place. **The court must weigh the manner, the place, and the circumstances to determine reasonableness**. If the defendant has no intention to cause harm that’s nice but it doesn’t matter. **Usually a substantial harm must be shown to qualify for damages**.

🡪There is an idea here that the plaintiff had an unusual sensitivity to the defendant’s conduct by virtue of the fact that he owned a TV store. The measure of unreasonableness and the substantial causation of the defendant were also at issue.

🡪Note that Honeywell merely made the computer that caused the interference. This shows that anyone who “materially participates” in causing the harm can be sued for the nuisance.

**Rights considerations in property law compare a property owner’s freedom to do as he wishes with another property owner’s right to security. Social welfare considerations compare the social costs and benefits of disputed conduct**.

**Unreasonableness is found when the gravity of the harm outweighs its utility**.

🡪The gravity of harm is determined by the (1) extent (2) and character of the harm, (3) the social value of the abused use and enjoyment (4) the suitability of that use and enjoyment to the locality, and (5) the burden imposed on the defendant to stop that activity.

🡪Utility of conduct is determined by (1) the social value of the conduct, (2) the suitability of that conduct to the locality, and (3) the impractibility of avoiding intrusion on another’s use and enjoyment of property.

Property rights must be clear. We need predictability in property law so that people are encouraged to use their land to the full extent, which they will only do if they know what their rights are. Still, even when the rules are ambiguous or the standards are vague, case law makes the rules clearer. Standards can at least be molded whereas rigid rules often don’t work.

*Fancher v. Fagella* There was a tree protruding over the plaintiff’s property line and the roots of that tree were damaging the neighbor’s patio and a wall dividing the properties. **The MA rule allowed for self-help only**—there would be no remedy for nuisance and no duty on the part of the tree owner to act. **The VA rule stated that the use had to be “noxious” to be actionable** (although it was somewhat unclear what “noxious” meant). **The Restatement rule imposed liability only for artificial or man-installed offenses** (trees and other natural nuisances were not actionable). **The HI rule stated that trees and plants could only be actionable when they caused actual harm to the plaintiff**. The HI rule is the one adopted but the remedy to be applied is not decided.

***Light and Air***

*Fountainbleau v. FortyFive-TwentyFive*. Competing South Beach hotels get into a lawsuit. One claims that the other is erecting a 14-story, 100-foot addition to their hotel out of malice to ruin the sunlight over the other’s pool area. The Court finds a lack of intentional malice because the addition could be seen to have a good, functional purpose. In addition, no person has the right to the free flow of light and air so there is no right is infringed.

*Prah v. Maretti* (1982) WI. Court determines whether a man poses a nuisance to his neighbor when he begins building a home that blocks the neighbor’s ability to use the solar energy panels on his home. This is another question of the homeowner’s right to light and air. The court rejects the value accorded to the old principles that governed access to light and air (highest regard for the freedom of the property owner, idea that sunlight has little value, high regard for the development of property) and decided that a reasonableness test should be employed.

🡪Dissent: This judge believes that solar energy panels are an unusually sensitive use not protected under nuisance law. The plaintiff could’ve oriented his home differently or he could’ve bought the adjoining property to deal with this beforehand. Building a home on one’s own property is not unreasonable and it’s silly to allow this suit to proceed.

The majority rule is not to regulate interference to the free flow of light and air—this would make every new building a liability. Only Vermont and New Hampshire have rules allowing light and air to be nuisances. It is noted that, contrary to popular fear, their nuisance law has not descended into chaos.

**LATERAL SUPPORT**

Property owners own the surface of the land and the earth beneath the surface. Excavation of the adjoining property can compromise the lateral support of a home. Similarly, an overdrawing of water for a well can compromise a home’s subjacent support.

*Noone v. Price* (1982) WV. The Noones had a home that was sinking which they claimed was the result of the Price’s failing to properly maintain a retaining wall on her property at the bottom of a hill, on the top of which the Noones’ home was built. The Noones’ home (1928-29) had been built after Mrs. Price’s (1912). The Noones’ claim was that due to Mrs. Price’s negligence in failing to maintain the wall, she was damaging the lateral support for their home. The court states that there is strict liability for the withdrawal of lateral support but because the retaining wall was built before the Noone’s home existed they would need to show that the disrepair of the wall would be damaging to their natural land, even without the weight of their home on it. Price had no duty to build her wall so as to support later structures on adjoining land; she only needed to preserve the lateral support for the natural land. Notice also mattered because Price argued that the Noones were aware of the disrepair of the wall before they acquired the property.

🡪If there had been a finding of liability here, the Noones could’ve recovered for the damage to their land and to their property. This is the majority rule. If the home would’ve been damages anyway even without the withdrawal of lateral support then there is no liability.

There is a servitude that prevents a property owner from using his land in way so as to remove lateral support from his neighbor’s property.

***Noone* exemplifies the common law rule that there is a right to a servitude for lateral support of natural land. This is a strict liability right. Under the common law it does not translate to a right to lateral support for buildings and structures**. There is a duty there only to avoid negligent behavior and to provide proper notification before undertaking an activity like excavation.

There is also a negligence rule out there that says that as long as you do not receive lateral support negligently and as long as you provide notice beforehand, you can remove lateral support regardless of your neighbor’s reliance on it. [Singer says this is close to no duty.]

States may supplement or supplant the common law by statute as they often do with state building codes. However, violation of that code may not mean that the adjoining property owner can recover damages. The statute must (1) create an express or implied right to private remedy, (2) the criminal punishment (fines, imprisonment) must not be exclusive remedies, and (3) a court must decide to alter the common law to accommodate the relief sought.

*Arguments FOR a private right of action*: complete protection implies protection of the property owner who won’t be adequately protected without damages; legislative intent suggests public safety precautions are most important

*Arguments AGAINST a private right of action*: stated penalties are exclusive; it is unfair for there to be multiple sets of liability (administrative fines/criminal liability/civil damages); neighbors should not bring lawsuits the building inspector who has expertise on the matter should.

If you make an argument about efficiency or employ a cost-benefit analysis, you need to show why the costs outweigh the benefits (or vice versa). You can also say that there must be a better way of fixing the problem.

**SUBJACENT SUPPORT**

*Friendswood Development v. Smith-Southwest Industries* (1978) TX. The plaintiff sued for negligent and excessive pumping of water from their land, which led to the subsidence of nearby land. The court acknowledged that for many years they had been using an absolute ownership rule or English rule that allowed property owners to pump as much water as you want as long as the pumping is not done maliciously. But this rule gives no regard for the interests of other property owners. Here, the defendant had knowledge that subsidence would occur and went ahead anyway, not necessarily maliciously, but maybe negligently. The plaintiff wanted the court to institute a reasonable use or American rule. The court agrees that this new rule is the right one but declines to apply it retroactively for this case. For future cases, landowners must avoid negligent (as well as malicious and wasteful) pumping of water leading to subsidence. The court believed the legislature had already begun to move in this direction anyway.

🡪Dissent: Majority has misunderstood the issue; the cases they rely on are cases about groundwater and that’s not what we have here. This is a case of first impression about the right to subjacent support. The court should’ve ruled that a property owner is liable not just for negligent, malicious, or wasteful pumping, but also nuisance or knowledge that the damage will occur. The fact that the defendants knew this would happen was enough to warrant retroactivity.

🡪Some courts impose strict liability for subjacent support while others go with *Friendswood*’s negligence standard (negligence in the manner of withdrawal, not negligence for withdrawing even if the consequences were foreseen).

Differing Standards of Care

1. Strict liability—absolute right, liability even when the utmost care is used for reasonable conduct
2. Reasonableness test—weigh the reasonableness of the defendant’s conduct against the plaintiff’s harm
3. Negligence—determine if the harm was foreseeable and places a focus on the reasonableness of the defendant’s conduct
4. Nuisance—determine if the harm to the plaintiff’s use and enjoyment of property is unreasonable with a focus on the consequences the defendant has caused as well as the presence of substantial harm

Nuisance vs. Surface Water

Reasonableness test (nuisance) strongly encourages a balance of rights.

The common enemy rule (surface water) strongly encourages the right of freedom.

Strict liability (lateral support) strongly encourages the right of security.

Make an argument that says the result is fair to both sides!

**ADVERSE POSSESSION**

**Adverse possession occurs where possession of another’s land is (1) exclusive (2) open and notorious (visible) (3) continuous (4) hostile (without the owner’s consent), and (5) for the statutorily required period of time**. When these conditions are met, title transfers from the original owner to the adverse possessor.

*Brown v. Gobble* (1996) WV. The Browns sue their neighbors to assert their right to a 2 foot strip of land enclosed by a fence to make it seem as if the land belonged to the Gobbles although surveys of the land showed that the tract actually belonged to the Browns. The court believed that there was a successful adverse possession on the part of the Gobbles so that the land was theirs. **(1) Adverse** **means against and inconsistent with the right of the true owner**—this was met by fencing the disputed tract. **(2) Actual means the possession was used for enjoyment, cultivation, residence, or improvements**—this was met by cultivation of a garden, maintenance of the fence, mowing of the grass on that tract, and building of a tree house. **(3) Open means in such a way as to put the true owner on notice of another’s claim to the land**—this was met by the general neighborhood’s understanding that the land belonged to the Gobbles and their predecessors. **(4) Exclusive means no one else claimed the land**. **(5) Continuous** requirement was met. The 10 year requirement for adverse possession was met by tacking their predecessors’ actions to their own. The evidence met the standard of clear and convincing so it was valid.

*Romero v. Garcia* (1976) NM. Romeros sue to establish their ownership of land, conveyed to them by the Garcias, for which they hold color of title. The dispute is that the original deed is insufficiently clear to determine what land was intended to be conveyed. The court disagrees, pointing to boundary markers for the corners of the property. They believe that if a surveyor can make out the property that’s good enough. The markers were a fence, a pile of rocks, a pipe, and a house.

*Nome 2000 v. Fagerstrom* (1990) AK. The Fagerstroms settled on a part of some property owned by Nome 2000 in 1970 or 1971 at which time they marked off the boundaries of “their” land. Since 1974, they had visited the land every weekend during the warm season and used the land recreationally. In the northern corner they had built a cabin (1978) and other structures (reindeer shelter, picnic area, camper trailer). The rest of the land was used for fishing, picking berries, etc. The court believes that they have successfully adversely possessed this northern portion of the property but not the southern part because they did not *actually* possess it such that a true owner would be on notice of their hostile intent to claim that land. Besides the borer markers had been moved or lost. **Seasonal use of the property was sufficient to be deemed continuous—land need only be used as an average user of similar property would use it**. **Nome tried to argue that because they were Native American’s they had no “intent” to actually possess the land but that was roundly rejected** (and it was kinda racist).

*Actual possession—use consistent with the land and reasonable owner’s activities*. It can be shown by marking boundaries, building on the land, planting, doing business, farming, clearing land. Usually a fence is sufficient to show actual possession.

*Open and notorious—visible so as to put the true owner on notice*. Reasonable inspection standard means that the true owner will check in on occasion and be able to tell that someone is trying to claim his property. [Some states will toll the statutory period for true owners with a disability (infancy, insanity, wardship, etc.), being out the state, imprisonment.] Fencing, mowing, building, clearing land, using land for storage, parking, picnicking, harvesting crops, etc. could show this.

*Exclusive—does not mean that no one else used the property it means that the adverse possessor has used the land in a way consistent with true ownership* (i.e. other people also aren’t claiming right to it).

*Continuous—used the land for the statutory period*. Tacking is allowed but not if you dispossess the previous adverse possessor.

*Hostile/adverse—use of the land not through the permission of the true owner*. There is a presumption that use of another’s land is non-permissive. When permission is given it lasts until clearly revoked by the true owner. Typically there need not be an intent to adversely possess.

*Color of title—a defective deed to land.*

*Intent*

1. Claim of right—belief that an adverse possession claim is defeated if the possessor never intended to claim land outside of his own boundaries.
2. Intentional dispossession—aware that the land is not yours; intent to oust true owner. This test is widely discredited because it encourages bad faith possessions and fails to protect innocent possessors.
3. Good faith—innocent and mistaken possessors only can succeed on their claims.

*Arguments FOR good faith possession only*: don’t want people to benefit from their bad behavior and trespasses; bad faith requires too much of a burden on true owners to check up on their property to ensure that there are no new squatters; recognizes emotional/psychological attachment to land; shifts burden to prove that there has been bad faith

*Arguments AGAINST good faith possession only*: encourages best use and land development; difficult to determine a person’s mental state in court; if the true owner hasn’t paid attention the property within the statutory period (like 10 or 15 or 20 years) then how much could they care about the property, emotionally or otherwise; a mental requirement is difficult to administer when it comes to tacking claims; why should intent matter if the other elements are met.

SEE PAGE 200 FOR A DISCUSSION OF RIGHTS AND NO RIGHTS.

**EASEMENTS**

**Easements are limited rights to do something on someone else’s land or to control the use of another’s property. An affirmative easement is the right to do something on someone else’s property i.e. a right of way. A negative easement or a servitude prevents the property owner from using his land in a certain way**.

***Prescriptive Easements***

**There must be (1) use; which is (2) adverse (3) continuous (4) open and notorious, and it must meet (5) the statutory requirement**. NOTE that there is **no exclusivity requirement** here as there is for adverse possession. NOTE also that **a prescriptive easement does not result in a transfer of title; it results in a right to continue using the land**.

*Community Feed Store v. NE Culvert* (1989) VT. Plaintiff seeks a declaratory judgment for a prescriptive easement to use a gravel area on the defendant’s property for the purpose of delivery trucks and customers parking/turning around. The court believes that there is an easement here. Use of an easement need not be precisely the same every time it is used but it does need to be possible to make out the general outlines of the use. **The test for a prescriptive easement is use that is hostile, open, notorious and continuous for the statutory period. For private use of private land there is a presumption that open and notorious use is also adverse so the argument that the plaintiffs had the defendant’s permission is not useful without proof**.

🡪Many states have rejected the presumption introduced here and instead assume that if the use is limited then it is permissive.

🡪Socially it seems good to assume that such use is permissive. Economically and developmentally it seems better to award use to those that make the best use of land by assuming that their use is non-permissive. Rights-wise a presumption of permissiveness could violate fundamental rules or trespass and the right to exclude. Coase theory.

How continuous is continuous enough for prescriptive easements? Is it every day? Every week? It depends.

Some courts will defeat a prescriptive easement claim if the person claiming the right honestly believed that they were not trespassing or using another’s land—their conduct fails the claim of right test.

🡪Modern courts tend to recognize a public use of private land as potential to gain a prescriptive easement. But the presumption has traditionally been that public use of private land is permissive and this defeats the adverse element of the claim.

***Unjust Enrichment***

**When someone builds a structure on the property of another the traditional rule is that the true owner gets to keep the land and the structure and the other person is just out of luck—this is called the annexation rule**. The true owner was also thought to have an absolute right to have the structure removed from the property, no matter the cost, burden, or actual harm to the property.

Many courts now follow the **relative hardship doctrine** instead which takes into account **whether or not the encroachment is innocent, the amount of harm caused, the cost of removal, and the interference with the true owner’s rights**.

🡪Instead of removal, a court may order compensatory damages or forced sale of the land to the encroacher. The factors must be disproportionate to withhold injunctive removal of the structure.

🡪Bad faith encroachment typically results in an order of removal.

*Somerville v. Jacobs* (1969) WV. The plaintiffs, relying on the word of a surveyor, built a whole building on the land of the defendants. The defendants claimed that they owned the building because it was on their land. The plaintiffs claimed unjust enrichment to disgorge the defendants of the benefit ($17,500) or to compel the defendants to sell them the lot at the unimproved price. The court went with the plaintiffs believing that there were two innocent parties and that the law of equity required recognition of unjust enrichment at work. The court rejects the common law theory of annexation and tells the defendants that they have to sell the property or pay up for the improvement.

🡪Dissent: It is wrong to take the property rights of the innocent. This is akin to eminent domain.

🡪Although some states have betterment statutes that essentially codify this rule, this case represents a minority rule. Most courts go with the traditional annexation approach.

Other Means of Acquiring Property

*Oral agreements for boundaries* are acceptable when

1. both parties are uncertain about the true boundary or when it is in genuine dispute
2. when the existence of the oral agreement can be proven
3. and when action has been taken to show deference to the agreed-upon line.

*Estoppel* can be used when one owner relies on his neighbor’s statements about where the true boundary line is if improvements are made along that line and the line later turns out to be in error.

*Dedication* can occur when an owner makes an offer of his land to the government or the public and it is properly accepted. Acceptance and offer can both be informal or deduced from outward manifestations and actions.

*Adverse Possession of Personal Property*

*The Conversion Rule*—the statute of limitations begins when the true owner loses property

*The Discovery Rule*—statute of limitations begins when the true owner knows or should know the location of the stolen property

*The Demand Rule*—shifts the burden from the true owner onto the potential purchaser. Possession of stolen artwork doesn’t become wrongful until the true owner demands its return. It is not fair for the true owner to lose rights if he can’t find the stolen piece before the statute of limitations runs out.

**SERVITUDES**

This category includes implied and express easements, covenants, and implied reciprocal negative servitudes.

Easements are a right to temporarily invade someone else’s property right for a limited use. Normally, easements are created by deed and are express (through written contract—the deed). Many times, the easement will run with the land regardless of transfer to a new owner.

🡪Exceptions to the requirement that transfer of land be in writing (the statute of frauds) include easement by estoppel, easements by prescription, implication from prior use, and necessity.

***Constructive Trusts***

**A trust is a property arrangement where an owner (settlor) transfers title to another party (trustee) who manages the property for the benefit of a third party (the beneficiary). A constructive trust is a trust deemed to be in existence by the court. No express agreement or the intent of the parties is required for the court to find such an arrangement**.

Constructive trusts require a breach of faith or a breach of trust (a lie or misrepresentation for example); a deprivation of some interest in property (which the parties don’t own but should own); and there should be an element of unjust enrichment (injustice).

Constructive trusts could come into play in the context of family situations, divorce, or land meant to be willed to a third party.

*Rase v. Castle Mountain Ranch* (1981) MT. A number of cabin owners sue the ranch for rights to continue using their cabins which have been erected on the ranch. The previous owner had entered into nominal license agreements with the cabin owners with the intent and understanding that the owners’ licenses would never be terminated (though such an option was included in the lease). When title transferred to a new owner, he was told of this understanding but terminated the leases anyway. There could be no adverse possession because the cabin owners were there by permission (not hostile) and there was too much turnover to support a claim for a prescriptive easement (not continuous). The court found that there was a constructive trust and required the new ranch owner to either compensate the cabin owners for their losses or to allow them to stay on the land through 1987 before having them leave without compensation. The court saw this as a little something for everyone involved.

🡪This court could have used an easement by estoppel but they probably didn’t due to state law.

*Arguments AGAINST constructive trusts*: true intent should be embodied in the written contract; there was ability to put the true intent in writing and it was not taken; constructive trusts violate the statute of frauds; the most economic value may be achieved by not creating a trust; the reliance of the parties may be unreasonable

*Arguments FOR constructive trusts*: the reliance of the parties on the trust should be valued over sophisticated parties with knowledge of the law; putting things into writing costs a lot of money; there is a desire to not reward the bad behavior of parties who violate the intent of grantors and grantees

***Easements by Estoppel***

**These easements require proof of permission by the owner but they can be granted when this proof is present if the grantees have relied on the easement through finances or other behavior. The reliance must be a substantial investment and it must also have been reasonable**. Revoking the easement should create **a sense of injustice**.

*Holbrook v. Taylor* (1976) KY. There is a claim for easement by estoppel where the Taylors claim that the Holbrooks cannot revoke their permission to use a road to get to their home. The Taylors built a home and made improvements to this road relying on the Holbrooks permission to use it. The Holbrooks wanted to revoke the permission but the court said that they couldn’t because the Taylors have gained an **easement by estoppel**. It would be wrong to let the Taylors **spend that money in reliance. The permission is to continue as long as nature calls for it**.

Easements by estoppel come in two different types: implied (everything that’s not written) and express (written).

Oral easements technically violate the statute of frauds but may be granted if the intent was to grant the easement, the writing merely fails to meet certain requirements, there is ambiguity in the writing, or there has been fraud on the part of the grantor. Some courts will also grant an easement when there was intent to grant and the grantee has relied on this intent.

Irrevocable licenses are different from easements (seen in *Holbrook* and *Rase*). Usually, granting an easement by estoppel will violate the intent of the grantor, who probably wanted a revocable license (licenses in general are temporary and revocable). This decision will require balancing the grantor’s intent against the grantee’s reliance. The right to exclude may be limited if the grantor induces the grantee to expend funds or otherwise rely on continued access. To hold otherwise is to perpetuate fraud on the part of the grantor.

*Easements Implied by Prior Use*

**An easement implied by prior use is only granted when (1) two tracts were previously owned by a single grantor (2) one tract was previously used in an open and continuous manner for the benefit of the other tract (3) and the use is reasonably necessary to the enjoyment of the dominant estate (the grantee’s estate)**.

🡪Reasonable necessity is not that high of a bar. It was found when access to a recreational lake was denied because the lake increased the property value and the lake had been used for a variety of practical and recreational purposes.

Easements implied by prior use are available ONLY when the land all used to be a single property. They may be recognized for the grantor’s continued use (easement by reservation) or for the grantee’s use (easement by grant).

*Granite Properties v. Manns* (1987) IL. Question of whether there is an easement by implied right of prior use or an easement by necessity to use two driveways on the defendant’s land. The defendants had recently acquired this land from the plaintiffs and the driveways in question had been used by delivery trucks to make deliveries and exit the premises. The court believes that the burden of proof for an easement by necessity (the plaintiffs claim that their delivery trucks cannot turn around to leave without using those driveways) is higher when the conveyor of land claims the easement. However, this heightened burden can be reduced with evidence of prior use of the land to that end (here the driveways had been used in that capacity since the 1960s). [There is an eight factor test for intent to create and reserve an easement on p. 337] Here the length of use, the permanence of the driveways, and prior awareness of such use all played into the determination that there was an easement. If such a use is continuous and apparent, the necessity test need not be met to get an easement. Proportionality. Test if of reasonable necessity not absolute necessity.

Easements by reservation are more difficult to obtain than easements by grant (the idea is that the grantor should have written that into the deed or conveyance). But they got one in *Granite Properties* anyway.

*Easements by Necessity*

For easements by necessity, there is always a presumption that the parties intend the land to be put to practical use. This supports an easement for landlocked property. However if it can be shown that the conveyor manifested intent that no easement be granted and the grantee was aware of this, most courts will not grant an easement.

*Finn v. Williams* (1941) IL. Plaintiffs sue for the right to use a road that belongs to the defendant because it is their only means of getting to the public highway from their property. The defendants claim that there is another private road but that turns out not to be true…**The court finds that there is an easement by necessity when a parcel of land is fully surrounded such that there is no other outlet to a public road**.

🡪It seems like these facts would have also supported an easement by estoppel.

There are limited arguments against granting easements by estoppel—freedom of contract and tough love are the best ones and they kind of suck.

***Express Easements***

There are three issues to consider for express easements:

1. Interpretation—scope of easement
2. Enforceability—public policy concerns and reasonability
3. Running with the land—transfers of property and continued enforceability

A dominant estate is the estate that is benefited by the easement. The servient estate is the burdened owner.

Typically affirmative easements arise only when there are neighboring land owners for the benefit of use or that land through agreement.

Some easements run with the land. **Typically easements created by implication, necessity, and estoppel run with the land if they are intended to do so and are reasonably necessary for enjoyment of the dominant estate**.

🡪Otherwise, an easement can still run with the land if it is in writing, the original grantor intended it to, and subsequent owners had notice of the easement at the time of their purchase.

For the Burden/Benefit to Run with the Land…

* The **writing** must be in the document originally creating the easement (not every writing after that). The original writing will provide sufficient notice.
* **Intent** can be express of implied from the circumstances
* There are three kinds of **notice**.
  + *Actual notice*
  + *Inquiry notice* comes from visible signs of use by non-owners such that a reasonable owner would investigate further to find out if an easement exists
  + *Constructive notice* comes if the easement has been recorded in the proper registry and if the deed is in the chain of title

|  |  |
| --- | --- |
| **Benefit** | **Burden** |
| **Writing** | ? | ? |
| **Intent** | ? | ? |
| **Notice** | ? | ? |

**Benefits attached to the land are called appurtenant easements; those not attached are called easements in gross. The test to distinguish between the two is intent**.

*Green v. Lupo* (1982) WA. The court is looking at whether an express easement is in gross or appurtenant. The plaintiffs seek enforcement of the easement which the defendants try to deny on the grounds of nuisance and unforeseen consequences of the easement. The plaintiffs used to own the entire parcel of land but sold some to the defendants with the express understanding of an easement. Because the plaintiffs use their land for a mobile home community, some residents of which use the easement to race their motorcycles, the defendants sought to restrict the easement to use by the plaintiffs alone and not their residents too, arguing that the easement was personal only to the plaintiffs for ingress and egress. Looking at intent means that the court needed to look to the language of the easement, which was ambiguous. But the state has a presumption of appurtenant easements and a grant of easement for ingress/egress/utilities suggested appurtenances (although use of the defendant’s specific names suggested a personal rather than general easement). So the easement is appurtenant but they might able to impose restrictions on the easement as long as the restrictions don’t unreasonably interfere with use.

**An easement in gross does not run with the land it runs with the grantee such that he can use it without regard to any specific property** i.e. utility companies/power lines. If the land is useful outside of actual ownership of property it’s probably an easement in gross.

🡪Traditionally, these easements were non-transferrable but today they generally are

**Appurtenant easements run with the land and pass from owner to owner**. A beneficiary of the easement cannot sell the easement to someone else—it’s attached to the land.

*Cox v. Glenbrook Company* (1962) NV. Glenbrook and Cox are adjacent property owners. Glenbrook granted an easement to the previous owner to use a back road on his property for purposes of getting water (instead of going all the way around because there was another path) and Cox wants to assert a right to that same easement. They also want to widen and improve the road to support traffic in a residential neighborhood. The court believes that the easement is appurtenant and that they therefore have a right to use it. However, they go to the language of the original granting of the easement and find that based on the **language used** (“road as now located”—**shows intent**) there is no right to change the road (they are allowed to widen it but can’t make any other **improvements**, and the widening **must not interfere with others’ rights of use to the easement or cause an undue burden on the servient estate**).

*Henley v. Continental Cablevision* (1985) MO. Henley (a trustee for an easement) conveyed the easement for utility, wire, cable maintenance and installation to two utility companies, a telephone company and an electric company. The utility companies then sold a license to the defendant, a cable company, to install cable wires. The plaintiff sued to restrict the easement as to the cable company, arguing that the two utility companies had no right to sell part of the easement and that the cable wires were an added, unintended burden. The court doesn’t go with these arguments, believing that the **easement was exclusive** such that Henley (and his predecessor) had **no intent or personal interest in using the easement for the purposes which it was conveyed. Because the easement was exclusive of the property owner’s interests, it was also apportionable to others for uses consistent with the original grant**. TV cables were deemed to be consistent with telephone wires and stuff so this was fine.

🡪Usually easement are interpreted narrowly rather than broadly

🡪Exclusivity is important for the notion of apportionment because the owner of the servient estate should be able to retain control over the property by excluding persons he did not grant the easement to. He should also have the opportunity to license or sell the easement to others instead of having the court decide that extra people can use it for free

🡪At the same time, this would make it very difficult for cable companies because they would need to negotiate with every homeowner in the city. Public policy concerns, efficiency, light burden only on the grantor

Three issues to determine **whether an easement is beyond its scope**:

1. The **kind of use contemplated by the grantor**
   1. What can be done with this easement?
   2. Should this be construed narrowly or broadly?
   3. As in *Henley* it is permissible to analogize purposes.
   4. Most courts believe that a right of way easement can be used for an y general purpose
2. Whether the actual use is so heavy as to be an **unreasonable burden on the servient estate**
   1. Is the permitted activity too great, too noisy, too much?
   2. Principally this is to be determined from the grantor’s intent
   3. When the grantor’s intent is ambiguous, a balancing test may be used
   4. Balance the interest of the grantee in developing property against the interest of the grantor to be free of unforeseen burden
3. Whether the easement can be **subdivided**
   1. Who is the easement for? Only the grantee or his assignees too?
   2. Appurtenant easements run with the entire dominant estate so the right can be divided among new owners if the land is later divided (*Cox*)
   3. For easements in gross, the right is apportionable if the easement is exclusive (*Henley*—grantor doesn’t use the easement)
   4. If you’re not clear, look to the grantor’s intent
4. In general, expansion of easements is disfavored as is relocation of an easement.
5. When the writing is ambiguous, the presumption is that the easement is appurtenant.

*Arguments AGAINST expansion of an easement*: should not take advantage of the grantor’s generosity in being neighborly; must interpret narrowly to avoid abuse; intent; protection of grantor’s expectations

*Arguments FOR expansion of an easement*: language can be construed more broadly; unreasonable not to expect development; unreasonable to prevent development; right to subdivide implicates a right to expand when necessary; public policy concerns

Terminating an Easement

Easements last forever unless they are released in *writing*; *limited in time by their own terms*; if by *merger* the dominant estate becomes the owner of the servient estate; if the easement owner’s conduct shows that he has *abandoned* the easement; if there is *adverse possession* by the servient estate or a third party; or if there is *frustration of purpose* so that the easement becomes obsolete or impossible.

**COVENANTS**

**Covenants are agreements that restrict use of property. They must be in writing, there must be intent to run with the land, there must be notice, the covenant must touch and concern the land, and there must be privity**.

🡪 Grantor covenant—seller promises to restrict the retained land of the seller. Grantee covenant—buyer promises to restrict use of purchased property.

🡪There is a presumed intent to run with the land if there is a benefit to surrounding property owners. This presumption applies even if the writing doesn’t say that the benefit is intended to run with the land.

🡪Normally there will only be inquiry notice with sophisticated parties

🡪Touch and concern the land requirement asks if it is appropriate to benefit or burden future parties.

🡪Think of a situation where an owner sells his property and retains no interest in the surrounding property. If there is a benefit remaining there it would be a benefit in gross. Courts are not fond of benefits held in gross because there is an idea that the grantor holds no interest in the property anymore and a ghost-grantor shouldn’t be able to put restrictions on property he has no interest in.

🡪Privity of estate. There is horizontal privity when O sells to A and the covenant is recorded in the deed. There is horizontal privity when O leases to A and the covenant is in the lease. There is no horizontal privity for a contract between neighbors (no sale of property interests). There is vertical privity when A sells to another subsequent owner. Sometimes (depending on the court) there is vertical privity when A leases to another.

🡪For vertical privity leases, affirmative covenants typically don’t run with the land but restrictive ones do

**Equitable servitudes require all of the above except for privity**.

Historical Notes…

To get around the limitations on negative easements, people began entering into contracts about property use. These rights were assignable to future property owners as long as the agreement was in writing, was intended to be binding on future interests, touched and concerned the land, and if there was privity of estate.

🡪At the time, privity of estate meant the contracting parties had simultaneous interests in the same parcel of land (mutual privity). Today it has been broadened to include as an “interest” the actual moment of transfer (instantaneous privity), essentially eliminating the formal requirement.

In England equitable servitudes were adopted for when there was no privity of estate. The equitable servitude would apply if it was in writing, was intended to run with the land, touched and concerned the land, and if the current owner had purchased with notice of the restriction.

Both of these doctrines (equitable servitudes and covenants) have been adopted in the US and the distinctions between them have been abolished by the Restatement Third.

*Winn-Dixie v. Dolgencorp* (2007) FL. The question is whether a provision in Winn-Dixie’s lease requiring it to be the only grocery store in a shopping mall is enforceable against Dolgencorp. The lower court ruled that the agreement was not enforceable against Dolgencorp because they were not a party to the agreement. Reversed. The court believed that the covenant ran with the land (and thus applied to all dominant estate owners) because it concerned the occupation and enjoyment of the land and it tended to increase the benefit and value of the property. In general this kind of commercial lease is typically thought to run with the land. To be a valid covenant running with the land, the covenant must (1) touch and involve the land—this was met by the occupation and enjoyment; (2) be intended to run with the land—looked to the language of the agreement which “deemed” the restrictions to run with the land; and (3) there must have been notice to Dolgencorp—there was *implied actual notice* (Dolgencorp was a commercial party that knew or should have known how these leases worked) as well as constructive notice (the lease was recorded).

*Whitinsville Plaza v. Kotseas* (1979) MA. Kotseas (grantor) entered a covenant with Trust stating that Kotseas would not the use the land he had retained from the original parcel for purposes of competition with Trust or its successors. The covenant further stated that Kotseas would use the land only for certain enumerated purposes. Trust then sold the land (and the covenant) to Whitinsville. Kotseas opened a CVS and Whitinsville sued to enforce the covenant. The covenant was in writing; there was clear intent from the language of the covenant that it was meant to run with the land; there was both actual and constructive notice (the deed had been recorded in the chain of title); there was privity of estate (both had easements in each other’s property); and the covenant touched and concerned the land because the land use was limited and the restriction enhanced its market value. The case was remanded only to determine if the restriction was reasonable under restraint of trade laws.

🡪A point on privity…the original contractors here were Kotseas and Trust. They have horizontal privity. Each assigned their property interest to a new party—CVS and Whitinsville. These transactions create vertical privity between the assignees and respective assignors. (Kotseas🡪CVS; Trust🡪Whitinsville). Trust, who sold their interest, was no longer an owner and could not have brought suit to have the covenant enforced. However, Kotseas merely leased his interest to CVS so this is relaxed vertical privity (not every court would recognize this as vertical privity). However this could did, and he could still be held liable for their actions (that’s how he got sued☺).

*Davidson Bros v. Kats & Sons* (1990) NJ. The plaintiffs held a covenant over land bought by the defendant that required the defendant not to build a grocery store there. The defendant leased the land to the city who planned to put a grocery store there, so the plaintiffs brought action to enforce the covenant. It was argued and held that it was unreasonable to enforce this covenant as a matter of public policy—many residents didn’t have cars, there was no other grocery store nearby, people need food, and there was a need to keep food prices low to revitalize the area. **Because the covenant caused unreasonable hardship, it was unenforceable**.

The writing requirement of an easement can be relaxed if there have been oral misrepresentations—fraud or estoppel.

***Implied Reciprocal Negative Servitudes***

These solved the issue of privity for early buyers who wished to enforce covenants against later buyers (imagine a homeowner buys a plot in a neighborhood designed to adhere to a certain plan who wants to sue a later buyer who intends to deviate from that plan).

How it works is the court will deem the earlier buyer to be an **intended third-party beneficiary of the covenan**t, even as it made with later buyers, as long as there is a **common development plan**. In this way restrictions can be imposed on later buyers even if there is no chain of title. If a **declaration of the common plan** has been recorded prior to the later buyer purchase of the land, the later buyer is on **constructive notice** of the restriction. The implied reciprocal negative servitude has the effect of creating a grantee covenant (later buyer must restrict his plans to those that fit with the plan) and a grantor covenant (the developer will stick to the plan and restrict the lots remaining to be sold accordingly).

🡪The grantor gets a benefit because the plan will still be in effect even if he forgets to put it in some of the deeds and the grantee gets the benefit of assured reliance and increased property value.

🡪If the covenant is ambiguous, there is a current focus on the grantor’s intent and the reliance interests of buyers who reasonably believed that there was a restriction on neighboring property. The traditional approach was to impose the lease burden on the land but now the emphasis is on the underlying view that market value is increased when reciprocal covenants are enforced.

🡪A common plan can be shown by a map, by presence of the restriction in all or most deeds on the property, by conformity of other landowners, by explicit language that the covenant runs with the land, or by a recorded declaration of mutual enforceability.

*Evans v. Pollock* (1990) TX. The court **assesses the scope of a common development plan and determines that to be enforceable the plan need not apply to every single lot—some lots could be restricted while others were not and the plan could still be valid**. Earlier buyers sued later buyers who wanted to develop their acquired property in a manner outside of the development plan. They wanted to develop condos and a marina on lakefront property specifically restricted from commercial use to residential use for only one dwelling homes. The court restricted the development only as to part of the lots (the lakefront ones because from the language of the plan only those were intended to be restricted—something about their voting rights).

*Sanborn v. McLean* (1925) MI. Similar facts of the *Evans* case but simpler. Some owners of property had no restrictive covenants in their chain of title but 53 of their 91 neighbors did. The restrictive covenants limited the lots to residential use. The court believed that there was constructive notice based on the nature of the residential area and that **the presence of a majority of restricted lots meant that there was intent to create a common plan such that it would be imposed on all lot owners**.

🡪Most courts believe that buyers of unrestricted lots have constructive notice of their neighbor’s deeds

*Riley v. Bear Creek Planning Committee* (1976) CA. The court allowed a couple to circumvent the covenant restrictions of a common development plan because they bought their property before the declaration was recorded (and because even when it was recorded it failed to show the restrictions). Even though they had actual notice of the plan before they bought the property, it was not allowed as admissible evidence (parol evidence rule). Vigorous dissent hates that they were able to get around this even with actual notice of the intended restrictions.

Nevertheless, there is still a strong presumption that once the developer has sold all the lots of the plan, he no longer has an interest in the future development of the property and loses his standing to bring suit (developer’s interest was the marketability of the plots—once sold he’s done). The control shifts to new owners to enforce the restrictions.

🡪Some courts will allow for developer standing if it is provided for in the declaration and is reasonable

*Blevins v. Association for Retarded Citizens* (1986) MO. A group of neighbors sue to prevent the defendants from establishing a group home for 8 mentally disabled persons by claiming that it violates a restrictive covenant that limits the property to residential uses and a single or double family dwelling. The court believes there is no violation. Residential merely means not commercial or a business and this is a non-profit venture. Single family means the nature of the building not the nature of the occupants (i.e. they don’t have to actually be a family).

🡪There is a lot of litigation on whether group homes are commercial or not. Are people paying rent? Are the inhabitants related by blood, marriage, or adoption?

🡪Would enforcing a covenant against a group home be violation of public policy? Courts have gone both ways

Covenants and Homeowners’ Associations

These associations are created by the developer prior to sale of the first lot. Voting rights are divided amongst owners, usually according to property interests. Homeowners’ associations retain standing to enforce covenants if it is so stated in the declaration.

Like developments, condominium associations are set up by the recorded declaration. It enables the association to make bylaws for self-government, explains the management structure, and may contain covenants.

Both homeowners’ and condominium associations are called common-interest communities.

Disputes usually arise between the unit owners and the developer about management or between individual unit owners over the way a unit is being used.

*Appel v. Presley Companies* (1991) NM. The Appels sued the defendants, developers of a property, after they made an amendment to a set of restrictive covenants that would change the nature of the property—the defendants changes restrictions as to 9 lots. The Appels claimed that this was a violation of their expectations and that there was estoppel at work to enforce restrictions that the properties would only be used for single family residential dwellings. The court remanded to determine if the amendments were reasonable as a matter of fact.

*Shelley v. Kramer* (1948) SCOTUS. A group of 47 out of 87 homeowners signed and drafted a restricted covenant that land would not be occupied by any non-white persons, especially not blacks or Mongolians. The Shelleys, a black family, bought property in the neighborhood and the homeowners tried to evict them. The Shelleys claimed that the covenant violated the 14th Amendment. Well the 14th Amendment only applies to state action, but the court does find that judicial enforcement of this covenant would amount to state action so that would deprive the Shelleys of equal protection under the law. In other words, this covenant represents more than just a private right of action.

*Evans v. Abney* (1970) SCTOUS. GA Senator Bacon puts land in a trust to be used for a city park to be enjoyed only by whites. The trust passed to the city of Macon which kept the park segregated for a while before realizing the error of its ways. Bacon’s descendants, not as highly civilized, demanded the trust be returned to them so that their great ancestor’s vision of a segregated society could be fulfilled by closing the park. Action was brought to keep the city from returning the trust to these descendants because the plaintiffs argued that the offending provision about race could be ignored under **the *cy pres* doctrine. This doctrine allows an impossible term to be essentially deleted, with the rest of the plan going forward**. The court found that the *cy pres* doctrine was inapplicable because the clear language of the will was to segregate at all costs—this was **too essential of a provision to delete (idea that the grantor would’ve rather had no trust at all than to have the trust without that provision**) so the default state rule was that the trust would revert to the named heirs of the estate. The court believes that there is no judicial enforcement of discrimination via this result because the park’s closing adversely affects blacks and whites alike.

🡪Dissent: This is just like *Shelley*; it’s state-sponsored discrimination through the court system. Plus this is even clearer because here a municipality ran the park and closed it down rather than integrate it.

***Anticompetitive Covenants***

**These covenants are only enforceable when reasonable and they usually deal with shopping center leases**.

**Exclusivity clauses** are not always unreasonable—they may be necessary to attract certain businesses to open a store in a particular location in order to generate additional business.

To determine reasonability, first determine the **product or type of service**, followed by the **geographic area of likely competition**. Then compare the **anticompetitive and procompetitive effects**.

*Davidson Brothers v. Katz & Sons* (1994) NJ. A covenant prohibiting the use of a building as a grocery store is held to be unenforceable as a matter of public policy. **There are eight factors to determine reasonableness**: (1) intent of the parties at the time the covenant was executed (2) effect of the covenant on consideration exchanged (3) clarity of the covenant (4) writing, recording, and actual notice of the covenant (5) geographic area and duration of time [found here] (6) unreasonable restraint of trade [found here] (7) public interest concerns [found here] (8) effect of changed circumstances to make the covenant unreasonable in the present day.

The above test has replaced the touch and concern test to better include the element of public policy. **The current Restatement test affords a presumption of validity of a covenant**.

*O’Buck v. Cottonwood Condo Association* (1988) AK. The condo association bans antennae on the roof after it is found that they have contributed to roof damage. The authority for the rule was found in the bylaws regulating exterior, uniform appearance, and use of common areas (roof). The ban was not unreasonable because it meant only a small monthly fee and the plaintiffs were rich anyway; the condo association believed that the change would enhance the marketability of the building by installing a single cable system and improving exterior appearance.

*Neuman v. Grandview* (2003) FL. Grandview is a condo association that made a rule banning the use of an auditorium for religious services. Some unit owners sued arguing that this violated their right to peaceful assembly. The condo association was allowed to regulate the common areas as long as it was done reasonably. The association made the decision to avoid the disputes arising from use of the auditorium and even if this did implicate the

Differing Standards of Enforcement of Covenants

* The traditional rule is that covenant must touch and concern the land
* The NJ standard will enforce the covenant if it is reasonable (*Davidson*)
* The CA standard will enforce the covenant unless it is unreasonable
* The Restatement Third has a presumption of validity unless there is a violation of public policy🡪anticompetitive, discriminatory, restraint on alienation, speech, religion, association, etc.

Differing Standards of Enforcing Home Association Rules

* Must be reasonable (*O’Buck*—majority rule)
* Business judgment (*Levandusky*—NY rule). There is a strong presumption of the validity of the covenant as long as there is some exercise of business judgment involved
* The general rule of reasonableness is less deferential for a rule than for a covenant. The NY rule of business judgment is the equivalent of the presumptive validity of a covenant.

***Changed Conditions***

*El Di v. Bethany Beach* (1984) DE. The original town of Bethany Beach was a small, quiet, Christian-based community that issued lots of covenants restricting the sale of alcohol. Over time the city expanded so that only 15% of the lots still had such covenants, the once residential portion of the city is not zoned for commercial use, and a practice of BYOB has evolved over the years in many establishments. El Di applied for and received a liquor license but the city sued to enforce the restrictive alcohol covenant. The court declined to enforce the covenant on the grounds of changed circumstances. **Changed circumstances means that the covenant is now essentially unenforceable because its underlying benefits have been made incapable of enjoyment by a fundamental change in the inherent character of the situation**.

🡪Dissent: BYOB practice is not equivalent to actual sale of alcohol. The town is still very quiet and hasn’t changed as much as the majority suggests.

🡪**This test is meant to be applied only when there has been a drastic change. The change must be so radical so as to defeat the covenant’s essential purpose**.

🡪Singer notes that many people apply this test incorrectly on the exam. In actual practice, the test is actually applied much closer to the way that the dissent in this case would have used it than the way that the majority does

*Blakely v. Gorin*. Hotel with the light and air and the apartments next door. Damages were appropriate but the building could go forward.

Other Ways to Defeat a Covenant

* A covenant may fail for acquiescence to prior violations without complaint
* Intent to abandon the covenant
* Unclean hands occurs when the plaintiff has violated the covenant himself
* Estoppel
* Laches occurs when ignorance of or breach of a covenant has persisted such that there is now a reliance that the covenant will not be enforced

**ESTATES AND FUTURE INTERESTS**

There are two ways a person can share property: concurrently as in husband/wife, roommates or over time, where a present owner has interests in the property and a future interest holder acquires those rights if and when the present interest terminates.

Conferral of interests can be direct or indirect. Direct interests mean the conveyor wants to control the grantee’s use of the property (like the interest will be conveyed as long as the property is only used for residential purposes). Indirect interests don’t care about controlling future use (property reverts when the present owner dies).

These present and future interests can be created by sale, lease, will, trust, or deed.

A future interest exists at the moment it is created although the party with the future interest has no possessory rights to the property at that time. Questions include whether the future interest in enforceable and if so by who; whether the condition triggering the transfer of the interest has occurred; and if the interest is deemed to be unenforceable whether the property is then free of all future interests or if the interest resides elsewhere.

🡪A potential problem is that of the “dead hand.” We don’t want old owners that are either dead or gone to be able to restrict future uses, impede autonomy, and restrain the freedom of land use. We also worry about hierarchy constraints that would restrict the flow of land only to certain races or only to family members—this negatively impacts access to property.

When you transfer property to another, whatever you property interests you own in the property are transferred too, unless you make a different arrangement.

***Fee Simple Interests***

***O to A***. ***O to A and his heirs. O to A in fee simple***. Fee simple absolute. Whatever O has goes to A. O conveys to A but the property reverts to O if not conveyed in A’s lifetime. A’s heirs have a chance to inherit and A can sell the property (alienability). A fee simple absolute means there is no future interest attached in O—the grantee can use it, sell it, leave it to others in his will, give it away, or leave it to his heirs.

Defeasible Interests

***O to A as long as used for residential purposes***. This is a fee simple determinable. It is inheritable and alienable. This kind of interest shifts automatically if the condition is violated.

🡪Could create a claim for adverse possession if the person violated the condition but just kept staying on the land. Statute of limitations would begin to run at the time the title shifted.

***O to A, but if used for non-residential purposes, O shall have a right of entry***. This is a fee simple subject to a condition subsequent. Here, the transfer is not automatic—O must assert the right of entry to get title. If A refuses, then A becomes a trespasser.

🡪Here, a statute for limitations for adverse possession would not start running until the right was asserted.

🡪Some courts require the assertion to be made in a reasonable time while others use the same statute of limitations as for a fee simple determinable.

🡪Note that the only difference between this and a fee simple determinable is the language that is used. A fee simple determinable says that *while* a condition lasts the property is A’s. A condition subsequent interest means that a right *accrues* upon a certain condition.

***O to A on condition that it be used only for residential purposes***. This is another formulation of the fee simple subject to condition subsequent. Some courts split on how to treat this language.

Future Interests in a Third Party

Whenever future interest lies in someone besides the grantor, the future interest is called an executory interest. Here ownership shifts automatically. This covers any conveyance to a third party upon an event that is not the current owner’s death.

***O to A unless used for residential purposes, then to B***. This is a fee simple subject to executory limitation. An executory interest divests or cuts short the interest of a prior grantee. B would hold a shifting interest in the land.

🡪A springing executory interest is created when the conveyance is placed in the future i.e. ***O to b when B graduates law school***.

🡪A transfer of property from O to A for A’s life then to B is not seen as executory, A’s life is a natural termination (life estate) and B has a valid interest called a remainder.

Defeasible fees terminate at the occurrence of a specific event other than the death of the current owner. These fees are not absolute.

🡪When future interest lies in the grantor, transfer can be automatic or it can be upon assertion of right.

🡪An automatic transfer is known as a fee simple determinable and the future interest is called possibility of reverter. ***O to A as long as used for…O to A while used for…O to A during such use…O to A unless used for…O to A if used for…then property shall automatically revert to O.***

🡪A transfer upon assertion of right is a fee simple subject to subsequent condition. ***O to A on******[condition]/if not then right of entry…O to A, but f so used, O has right of entry…O to A provided that if violated I shall have right of entry***.

***Life Estates***

Ownership is granted for the lifetime of a party. If the interest reverts to the grantor this is known as a **reversion**. If interest shifts to a third party this is a **remainder**. This is distinct from a fee simply because the property is **not inheritable** (the grantee cannot choose who will get the property after his death). The property is alienable but **only during the life of the grantee**.

There are two kinds of remainders: contingent and vested.

* A remainder is contingent if the remainder takes effect only upon the happening of an event not sure to happen and/or the remainder will go to a person that cannot be determined at the time of the initial conveyance. ***O to A for life then to B if B does xyz…O to A for life then to the children of B…O to A for life and then to the heirs of B***.
* Vested remainders include every remainder that is not contingent. This means the person is identifiable at the time of conveyance and there are no conditions precedent other than the death of the current life estate owner. There are three kinds of vested remainders.
  + Absolutely vested remainders are not subject to change.
  + Vested remainders subject to open may be divided among those born in the future. A rule of convenience will close the class at the time of the life estate owner’s death.
  + Vested remainders subject to divestment may be destroyed by an event after the initial conveyance.
* A contingent remainder could be destroyed if the condition never vested itself before the death of the life estate owner or if there was a merger. The modern approach is that contingent remainders are indestructible.

Rule in Shelley’s case is that ***O to A, remainder to A’s heirs*** becomes ***O to A, remainder to A***. The two are merged into a fee simple absolute.

***O to A for life***. Property reverts back to O when A dies.

***O to A for life, then to B***. This is a remainder rather than a reversion. B has some interests in the property even before A’s death. Contingent remainders are subject to the rule of perpetuities. B has a remainder in fee simple.

***O to A for life, then to B for life***. After the reversions, the property will go back to O.

***O to A for life, then to B if B graduates from law school***. Contingent remainder.

***O to A for life, then to B, but if B flunks out of law school then to o***. B has a vested interest.

***O to A for life, then to the heirs of B***. Contingent remainder because you won’t know how many children will be alive at the time of A’s death. Also future children born don’t get an interest after A has already died (this as a matter of convenience).

***Conveying Only What You Own***

***O to A as long as used for residential purposes. A to B in fee simple***. B owns only a determinable fee simple interest because that’s all that A had.

***O to A for life. A to B.*** B owns the property only as long as A lives. When A dies the property will revert to O.

🡪Trusts are highly preferable to life estates because life estates are messy.

***O to A and the heirs of the body***. Traditionally, this would create a fee tail of property passing from heir to heir until the family line ends at which point it reverts back to O. Even if the property is sold in an heir’s lifetime, upon that heir’s death it would transfer back to the next heir. This kind of fee tail title has been done away with entirely in the US.

🡪This is so out of a desire to let people buy and sell land freely. A court faced with this language would probably turn it into a fee simple absolute.

***O to A with reversion to O upon some restriction of transfer based on race***. This is unenforceable, violation of the 14th Amendment and the Fair Housing Act.

***O to A and heirs on her father’s side/not to her no-good husband B***. Neither construction is enforceable.

Rules Regulating Future Interests

There is a presumption against forfeitures. This rule is used to help interpret ambiguous conveyances. This ignores the grantor’s intent and tries to get rid of future interests.

Two policies are important: the intent of the grantor and public policy considerations. A presumption against the finding of future interests may conflict with the grantor’s intent but it promotes the free use of land.

There can be no creation of new kinds of estates. These are limitations on division of property interests.

*Wood v. Board of Fremont* (1988) WY. A couple tries to assert ownership rights to a property conveyed to the defendant for use as a hospital in memorial after the defendant sold the hospital. They claim their conveyance was a fee simple determinable or alternately a fee simple subject to subsequent condition. The court looked at the language of the conveyance and determined that there is a rule that the intent of the parties must be clear before either fee simple determinable or fee simple subject to a subsequent condition can be found. Here, the critical language was lacking for either kind of fee simple. The buzz words “as long as,” “while,” “until,” “during” were all missing for a determinable and the buzz words “condition,” “provided that,” “if” were all missing for a subsequent condition. Neither fee simple is present.

*Cathedral v. Garden City Co* (1999) NY. Stewarts conveyed land to the Cathedral for religious and education purposes with no right for the Cathedral to assign, grant, or convey the property to another. Later, the Stewarts assigned their interest in the Cathedral to the defendant. The Cathedral went bankrupt, sought to sell its assets, and sued for the right to do so. The defendant claimed that there was either a conditional subsequent or conditional limitation. The court believed that there was no way the defendant could assert his right of entry because this right was not assignable; there was no evidence there would be an automatic reversion; perpetuity would be unconscionable; and there was no language to suggest that the Cathedral’s estate would terminate automatically if the grounds were no longer used as a Cathedral.

*Edwards v. Bradley* (1984) VA. **Life estates can have valid restraints on alienation. Fees simple cannot have a valid restraint on alienation**. The court turns a fee simple interest into a life estate because of the restraint on alienation. Interest of the grantor in the restraint on alienation vs. the terminology used to convey a fee simple—the court chose the restraint on alienation.

Rule against Perpetuities

The interest of the grantor was traditionally never subject to this rule. The rule basically says that we don’t want executory and contingent interests to be around forever—if the condition doesn’t occur within X years then the future interest is destroyed and becomes a fee simple absolute. This will come about in situations like ***O to A as long as used for residential purposes, then to B***. This rule is ONLY for executory interests and contingent remainders.

The period for the length of time is the length of the lives of those with interests in the property plus 21 years.

If the parties are corporations the time limit is 21 years.

Most states have a rule that if the interest vests within 90 years it is valid.

***Restraints on Alienation***

The key question of enforceability of a restrain on alienation is its reasonableness

There are five kinds of restraint on alienation

1. Direct restraints on transfer
2. Servitudes requiring consent of the grantor/developer/association to transfer property
3. Right of first refusal [These are preemptive rights—allows the holder to buy the property rather than having the interest holder sell it to someone else. The offer must be bona fide (market value)].
4. Leasing restrictions
5. Restraints designed to keep housing affordable for low- and moderate-income families

*Horse Pond Fish and Game Club c. Cormier* (1990) NH. The property of the gaming club is conveyed with a restraint that would not allow its alienation from the club unless there was dissolution of the club or 100% agreement by the club members. One member of the club voted against all the others to block a sale of the property, so the club sought a declaratory judgment that the restraint was unreasonable and thus invalid. The court remanded to determine if the club was **a charitable entity—if so, the reasonableness rule didn’t apply to them and the restraint would be valid**. Even then, the **valid restraint could be overcome if the sale was deemed necessary and in the best interest of the charity (*cy pres* doctrine**).

*Northwest Real Estate v. Serio* (1929). **Court unequivocally rules that a clause restraining sale of property dependent on the consent of the grantor is void** (repugnant). The clear intent of the clause was to deprive the grantees of their rights under the fee simple interest

🡪Dissent: There was nothing wrong with trying to build a neighborhood of a certain character in order to protect the grantor’s property interest.

*Riste v. Washington Bible Camp* (1980). WA. Court similarly strikes down a restraint on alienation requiring consent of the grantor. These kinds of restraints have a presumption of invalidity. This one would also be void on public policy grounds because it restricts sale based on the creed (religious beliefs) of the purchaser.

*Wolinsky v. Kadison* (1983). IL. Court rules that there are several causes of action for a woman who was denied purchase of an additional condo (the association invoked its right to first refusal) to be leased to an unmarried woman. **The criteria for reasonableness of a right of first refusal is to whether the reason for use is rationally related to protection of the property rights and the association’s practices PLUS whether the power has been used without discrimination**. In this case the association breached its own bylaws (2/3 vote required) and it discriminated on the basis of marital status and gender.

**🡪While restraints that require the consent of the grantor before transfer are generally held to be void, if the grantor is a homeowners’ or condo association the restraint will generally be upheld as long as the restraint requires reasonable use or it involves a preemptive right of first refusal.**

There are three kinds of total restraints on alienation. All of these are void and unenforceable.

1. Disabling restraints forbid the owner from transferring his interest in the property.
2. Promissory restraints ask the grantee to promise not to alienate his interest in the property.
3. Forfeiture restraints provide a future interest that vests if the grantee tries to transfer his interest in the property.

*Woodside Village Condo v. Jahren* (2002) FL. Homeowners seek an injunction against their condo association that says they cannot make an amendment to the rules saying that the condos can only be leased for nine months out of the year, no leasing in the first year of ownership, and no leasing more than three properties at once. The court says that these are valid restraints on alienation—owners had constructive notice that amendments could be made; **condos imply increased restrictions on use of the property;** **there is a presumptive validity of amendments that follow the delineated guidelines and voting procedures**; there is no violation of public policy here.

Most courts hold that language that explains the reason/purpose for the transfer of land is merely precatory and not meant to have binding legal effect (even for charities).

*Johnson v. Whiton* (1893) MA. Court strikes down a new kind of estate that would limit the heirs of a property to the current estate owner’s heirs only on her father’s side. This was an unreasonable restraint of alienation that violated public policy.

|  |  |
| --- | --- |
| **Future Interest In** | |
| **Present Interest** | **Buzz Words** | **Grantor** | **Third Party** |
| *Fee Simple Absolute* | to A  to A and heirs | N/A | N/A |
| *Fee Simple Determinable* | as long as  while  during  until  unless | Possibility of reverter | N/A |
| *Fee simple subject to condition subsequent* | provided that  on condition  but if | Right of entry  or  Power of termination | N/A |
| *Fee simple subject to executory limitation* | until/unless…then to  but if…then to | N/A | Executory interest |
| *Life estate* | for life | Reversion | Remainder |

When unsure whether a future interest is a fee simple determinable or a fee simple subject to condition subsequent, the courts will assume the latter because that one isn’t automatic.

The correct answer to one of these questions is I don’t know but it could be this, this, or this. Language is key to deciding what kind of fee simple interest there is.

If the interest cannot be a FS determinable, FS subject to condition subsequent, or a covenant, it will magically convert into a FS absolute.

Don’t forget to include a covenant as one of the options! Ask: is there a future Interest? What kind? Is there a covenant? Why?

**LANDLORD TENANT LAW**

A tenant is typically a person who has a defined space to take control or possession of when that space belongs to someone else. There is no requirement to pay rent to be a tenant!

Landlord-tenant relationships are governed by express and implied terms (no pets is express—covenant of quiet enjoyment is implied).

If a landlord sues for back rent or to evict, the plaintiff may raise several defenses. The tenant may seek a rent abatement or reduction or may claim that there is no rent owed because the landlord breached first. A tenant may also sue for injunctive relief.

Types of eviction include

1. Actual eviction—changes the locks on the doors🡪no more rent due
2. Actual partial eviction—closes off part of the premises🡪no rent is due or there is rent abatement
3. **Constructive eviction—interference with quiet enjoyment of premises by the landlord🡪right to stop rent payments and move out, but you have to move out**
4. **Partial constructive eviction—a portion of the premises is unusable🡪partial rent abatement**

***Constructive Eviction***

*Minjak v. Randolph* (1988) NY. Landlord seeks to evict tenants for two years’ back rent. The tenants claim they shouldn’t have to pay because the neighbor’s business activities (a sauna) ruined their use of their apartment (leakage) and because renovations made the building dangerous (elevator shaft, brick hit one guy on the head) and bad for their health (constant dust particles everywhere, musical equipment had to be covered to be protected). The court allows use of the doctrine of partial constructive eviction—the tenant abandons all or part of an apartment due to the landlord’s acts of making that portion or that apartment unusable by the tenant. The tenants had abandoned the music studio portion of their apartment. Punitive damages were available to deter this morally culpable behavior.

*Blackett v. Olanoff* (1976) MA. When the landlord failed to control noise emanating from a nearby lounge (the landlord leased both properties) the tenants could successfully claim constructive eviction. The noise constituted a considerable deprivation of their quiet use and enjoyment of their apartments and the landlord had control over the situation so he should have provided a remedy for the problem. The landlord’s intentions were unimportant (they did issue a number of warnings to the lounge) but the noise was a natural and probably consequence of their actions which they failed to control so this was constructive eviction.

***Implied Warranty of Habitability***

*Javins v. First National Realty Corp* (1970) DCC. The court establishes that **an implied warranty of habitability consistent with all housing codes must be read into all housing contracts to create an ongoing duty on the part of the landlord to maintain adequate, habitable premises in order to compel a tenant to pay rent**. The old rules were outdated and based on an agrarian society that only cared about land. Today’s tenants are mobile and expect a package of rights to come with their property.

Remedies for Breach of the Implied Warranty of Habitability

* Rescission, the right to move out before the end of the lease. Even when the breach would not support a constructive eviction claim, the breach can support rescission if it results in a material change in housing conditions
* Rent withholding. The tenant can stop paying rent but continue to live there. The breach of the implied warranty can be used as a defense to any eviction proceeding instituted by the landlord.
* Rent abatement. A reduction is usually taken by either fair market value or a percentage reduction that reflects the seriousness of the violation and inconvenience involved
* Repair and deduct. The tenant can opt to pay for repairs out of pocket and then deduct the cost from the rent payment
* Injunctive relief/specific performance requires the landlord to make repairs.
* Administrative remedies. An inspector comes to the premises to fine the landlord for the violations, the inspector may be empowered by statute to bring suit, force compliance with the housing codes, etc.
* Criminal penalties may be provided for in the housing code.
* Compensatory damages usually will not exceed rent payments but may include personal injury or emotional distress.

Retaliatory Eviction

*Hillview Association v. Bloomquist* (1989) IA. The defendants claim they are victims of retaliatory eviction for joining a tenants’ association that engaged in heated, tense debate with management. One member physically assaulted the regional manager. **There is a presumption of retaliatory eviction when eviction measures are taken within six months of the tenant’s action. The burden is on the landlord to rebut the presumption by showing evidence of a legitimate, non-retaliatory purpose for eviction**. Here the presumption was overcome as to the one tenant based on the physical assault, but not as to the other tenants.

*Imperial Colliery Co. v. Fout* (1988) WV. Fout claimed that his landlord sought to evict him based on his membership in a labor union. His landlord and his employer were related business corporations and he argued that the retaliatory eviction violated his 1st Amendment rights to freedom of association. The court did not allow the defense because they believed that **retaliatory eviction was only proper when the eviction was based on grounds incidental to the tenancy**—1st Amendment rights have little to nothing to do with housing rights.

***Leaseholds***

This is the typical rental relationship we all know and are familiar with. They can be either commercial or residential. Commercial leaseholds are anything that are non-residential—a church, a business, a nonprofit, a hospital are all commercial leases.

🡪Commercial leases are generally analyzed separately because the presumption is that residential leaseholds are not negotiated as much as commercial leases are.

Four types of tenancies/leaseholds:

1. Term of Years. Any length of time agreed upon by the parties with an automatic termination at the end of the term. Can be terminated beforehand according to the terms of the agreement or due to material breach. The future interest retained by the landlord is a reversion and the future interest of a third-party is a remainder.
2. Periodic Tenancy. This is a tenancy automatically renewed at specified periods unless the parties decide to end the relationship i.e. a month-to-month tenancy. Notice is required to terminate such a leasehold.
3. Tenancy-at-Will. Similar to the periodic tenancy but it can be ended by either party without notice. Death of either party terminates the agreement.
4. Tenancy at Sufferance. A tenant who wrongfully remains in property after a lease concludes. Removal proceedings are different for this kind of person than for a trespasser. Eviction proceedings are required, whereas for a trespasser, self-help is allowed.

The statute of frauds requires leases of more than one year to be in writing.

*Vasquez v. Glassboro Service Association* (1980) NJ. Vazquez, a migrant worker, was living on the property of his employer where he was given food, shelter, and care. He was fired and immediately turned out without time to secure alternate housing. Most of these workers were brought to the US by the employer but upon termination they received no assistance whatsoever. Vasquez spoke no English but signed an English only contract. The contract violated public policy and the court overruled the common law to require judicial proceedings before these migrant workers could be evicted, unless provided for in legislation or specific contract terms. The right of dignity is invoked here a la *State v. Shack*.

*Kendall v. Ernest Pestana* (1985) CA. Pestana wanted Kendall to pay more money to allow him to sublease the rented property (an airport hangar) to a third-party. The court believed that this was an unreasonable restraint on alienation. There must be a good reason to restrain alienation and there was no good one here. Court adopts a minority rule that is in conflict with the traditional rule that a landlord can reject a lessee for no reason or any reason. They believe that there must be a commercially reasonable objection to the lessee that has been applied in good faith for the rejection to stand. Factors to consider include the financial responsibility of the proposed sub-lessee, the suitability of the property for the intended use, legality of the use, the need for alterations, and the nature of the use (office, factory, etc.).

🡪Dissent: We should not have rejected the majority rule. The parties could’ve bargained for a reasonableness clause but didn’t.

*Slavin v. Rent Control Board* (1990) MA. **Court declines to apply the reasonable objection rule to residential leases**. Similar concerns about increasing the rent prices for sub-lessees and concerns about restraints on alienability are simply not as compelling for residential leases as opposed to commercial leases. **Categorical bans on residential subletting are allowed**.

**FAIR HOUSING ACT**

The FHA applies to racial minorities, families with children, and those with disabilities. Persons injured directly by the discrimination and those with sufficient standing to bring a case can sue under the FHA.

FHA claims can be sustained on either discriminatory treatment (intent) or disparate impact (effect).

Harassment after you move in can be sustained under the FHA by violating the right to “enjoyment of a dwelling.”

§ 3602—Definitions

*(b) "Dwelling" means any building, structure, or portion thereof which is occupied as, or designed or intended for occupancy as, a residence by one or more families, and any vacant land which is offered for sale or lease for the construction or location thereon of any such building, structure, or portion thereof.   
(c) "Family" includes a single individual.*

*(d) "Person" includes one or more individuals, corporations, partnerships, associations, labor organizations, legal representatives, mutual companies, joint-stock companies, trusts, unincorporated organizations, trustees, trustees in cases under title 11 [of the United States Code], receivers, and fiduciaries.*

*(e) "To rent" includes to lease, to sublease, to let and otherwise to grant for a consideration the right to occupy premises not owned by the occupant.*

*(h) "Handicap" means, with respect to a person--*

*(1) a physical or mental impairment which substantially limits one or more of such person's major life activities,   
(2) a record of having such an impairment, or   
(3) being regarded as having such an impairment, but such term does not include current, illegal use of or addiction to a controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802)).*

*(k) "Familial status" means one or more individuals (who have not attained the age of 18 years) being domiciled with--*

*(1) a parent or another person having legal custody of such individual or individuals; or   
(2) the designee of such parent or other person having such custody, with the written permission of such parent or other person.*

*The protections afforded against discrimination on the basis of familial status shall apply to any person who is pregnant or is in the process of securing legal custody of any individual who has not attained the age of 18 years.*

§ 3603(b)(2) of the FHA exempts owner-occupied dwellings meant for four or fewer families from the rules of the FHA.

*Asbury v. Brougham* (1989) 10th Cir. **To establish a prima facie case for housing discrimination, the plaintiff must prove (1) he or she is a member of a racial minority (or protected class) (2) applied for and was qualified to buy or rent the property in question (3) denied that opportunity to buy or rent or even the chance to inspect or negotiate (4) the property remained available. If a prima facie case has been established then the burden shifts to the landowners to prove that the refusal was motivated legitimate, non-discriminatory grounds. Once the landowner articulates such evidence, the burden of persuasion shifts back to the plaintiff**. Here Asbury was denied the right to view apartments but her white sister-in-law was allowed to view and offered an apartment. The defendants contended that they didn’t rent to Asbury because she had a child and they only allowed children in certain apartments, none of which were available at the time. The evidence showed that this was not true. Punitive damages were appropriate based on evidence that showed the defendant’s actions were motivated by evil intent or reckless/callous indifference to the rights of others.

*US v. Starrett City Association* (1988) 2d Cir. Starrett City is an apartment complex that uses racial quotas to ensure 64% white, 22% black, and 8% Hispanic occupants. **The court believes that this tenant system violates the FHA because minority applicants are turned away even if an apartment is available. It’s also unlawful to provide discriminatory terms or conditions of rental; to publish any notice, statement, or ad indicating a preference based on race or color; or to refuse to make an apartment available due to a person’s race**. The quota system was rejected because it was indefinite rather than temporary, it put the burden on minorities, and it was not implemented to remedy discrimination against whites in the past.

🡪Dissent: The FHA was enacted to ban segregation not to ban integration. This was a fine policy.

Racial steering is a type of housing discrimination that involves showing white and black applicants available housing in different areas. Racial steering is a kind of redlining—marking territory as unavailable for discriminatory purposes. Testers posing as renters can be used to find such discrimination.

The Civil Rights Act of 1866, aka § 1982, provides that all US citizens shall have the same rights to contract, lease, convey, inherit, buy, sell, or hold property as white people. In 1968 this statute was interpreted to ban private discrimination as well as discriminatory legislation passed by states. Now nearly every FHA claim is brought with a § 1982 claim.

*City of Memphis v. Greene* (1981) SCOTUS. The court rules that the closing of an access road that passes through an all-white neighborhood is not racial discrimination (discriminatory impact case). Having to take the long way around does not amount to racial discrimination.

***Sex Discrimination***

*Eduoard v. Kozubal* (2002) MA. Eduoard suffered sexual harassment at the hands of her landlord—he repeatedly tried to take her out on dates, forced her to pay advance rent when she refused, slapped her on the butt, groped, and attempted to rape her. This was enough for a prima facie case of sexual harassment. There were two kinds of sexual harassment—quid pro quo harassment and hostile environment harassment. **Quid pro quo harassment = (1) plaintiff is a member of the protected class (2) plaintiff was subject to unwelcome sexual conduct (3) tangible terms or conditions of her situation adversely changed (4) change was causally connected to rejection of sexual advances. Quid pro quo harassment = unwelcome, sexually charged behavior that creates a hostile environment**.

Some states, like MA, include sexual harassment as discrimination expressly. THE FHA DOES NOT. SCOTUS has held it to be included in the context of employment.

***Family Status and Families with Children***

*Human Rights Commission v. LaBrie* (1995) VT. Court believes that mobile home park has unreasonably imposed an occupancy limitation on housing units in violation of the FHA. The rule limited the occupancy to two persons and it was fairly obviously an effort to exclude children.

🡪Exemption from this rule exists in § 3607(b) and it applied to housing for the elderly

***Marital Status and Unmarried Couples***

*McCready v. Hoffius* (1999) MI. Unmarried couple sought to move in to the defendant’s residential property but when the defendants learned that the couple was not married they refused to rent to them, claiming that it violated their religious beliefs. The court ruled that this violated state fair housing laws as discrimination on the basis of marital status. The basis of the discrimination is held to be the unmarried *status* rather than the *conduct* of premarital sex. This is not a violation of the freedom of religion because even if it burdens some religious interests, there is a compelling state interest (equal opportunity housing) and no evidence of a less obtrusive means to secure that interest.

🡪Dissent: Cohabitation is not the same as marital status. This is criminalized conduct under state law and we should not protect it.

🡪Difficulty usually arises in these cases to determine whether there is an issue of status or conduct. Fewer courts worry about the infringement on exercise of religion.

***Sexual Orientation***

*State ex rel Sprague v. City of Madison* (1996) WI. State housing law is held to apply to renting to roommates as well. Housing was defined to include any building, structure, or part thereof which is used, occupied, or intended to be so used as a residence or place of habitation of one or more human beings. Court believed that this unambiguously included renting rooms in a house with shared common areas. The complainant had been turned away solely because she was a lesbian.

***Persons with Disabilities***

*Poff v. Coro* (1987) NJ. Court rules that a person with AIDS is handicapped under state discrimination laws. Landlord refused to rent to 3 gay men because he believed they would contract AIDS. **The refusal to rent based on perception of a disability is discrimination**.

The federal FHA requires a landlord to make reasonable accommodations for a person with a handicap. Landlords are required to make reasonable modifications of the existing premises to be occupied by such a person if necessary to afford full enjoyment of the premises. If reasonable, such modifications can be conditioned on the understanding that the person will restore the original condition of the rental property upon moving out.

🡪A question of reasonableness of the modification is whether the presence of the modification will interfere with the landlord’s or the next tenant’s use and enjoyment of the premises.

***Claims of Disparate Impact***

These claims almost always fail because it is easy to find that there is some adverse impact on protected FHA classes so the courts are reluctant to re-write laws based on that alone. They need a very compelling case.

*Huntington Beach, NAACP v. Town of Huntington* (1988) SCOTUS. Plaintiffs sought to open a low-income housing project to integrate a 98% white section of the city. **There was a prima facie case for disparate impact🡪practice of the defendant actually or predictably results in racial discrimination. Defendant then must prove that there is a legitimate government interest and that there is no less discriminatory means of achieving that interest—factors include evidence of discriminatory intent and whether the plaintiff seeks to compel the defendant to actually do something or merely wants the defendant to remove barriers so that the plaintiff can do something. A discriminatory effect can be created through the adverse impact on the minority group or through general harm to the community that results from segregation—both of those are in play here**. The state was unable to come up with any legitimate state interests that were not ad hoc.

*Doe v. City of Butler* (1989) 3d Cir. Suit was brought when there was a denial of housing for battered women. Not discriminatory on the grounds of sex because it would be equally applicable to a group home for male alcoholics. There was a possibility that the rule was discriminatory on the basis of familial status. Remanded.

**ZONING**

Use zoning regulates what kind of use land may be put to in a given area—residential, agricultural, commercial, or industrial. Area zoning regulates the size, height, and boundaries of property.

Zoning in a city is typically done according to a comprehensive plan for the entire municipality. Efforts at rezoning are generally required to follow that plan.

🡪Zoning committees will sometimes work with persons who wish to do something outside of the general plan to negotiate for special conditions so the project can move forward with minimal harm to the surrounding community. This is called contract zoning or conditional zoning. It is sometimes challenged as unconstitutional spot zoning, as being unauthorized by the zoning enabling act, or as inconsistent with the general plan.

*Southern Burlington Co, NAACP v. Mt. Laurel* (1975) NJ. Court rules that the state is not allowed to make zoning rules that effectively prevent low-income families from getting housing in a majority of the city. The ordinance restricts homes to single-family dwelling units and doesn’t provide for more affordable multiple-family dwellings so there was a disparate impact. There was over-zoning of industrial areas and a shortage of housing for the poor and minorities, which was contrary to the general welfare. The state had an interest of tax breaks for businesses but it was being achieved in an unreasonable manner.

*Durand v. IDC Bellingham* (2003) MA. No violation of state law when a zoning committee accepted an $8 million gift form the defendant and then approved the defendant’s application, which had recently been denied.

*Belleville v. Parrillos* (1980) NJ. Parrillos was a restaurant that had been operating in an area which the city later rezoned as residential. The restaurant was permitted to remain there as a **prior nonconforming use**. However, when Parrillos attempted to reopen as a club it was no longer protected—this was an **enlargement** and the change was too great. It warranted judicial intervention and was impermissible.

*Cochran v. Fairfax County* (2004). Three cases of the zoning board granting hardship variances to applicants that didn’t deserve them. **The threshold for a hardship is when the regulation interferes with all reasonable beneficial uses of the property taken as a whole**. One property could’ve been move 2 feet south and then been in accordance with area zoning laws; one property involved a structure that could’ve been moved to another location on the lot of left out of the project; and the last property involved a structure that could’ve been built elsewhere on the property but was granted as a hardship due to a college-aged daughter’s desire to store her belongings in the structure. None of these were sufficient to be approved outside of the ordinances they contravened.

🡪This case illustrates that variances are to be granted very rarely. They should only kick in when there are particular topographical conditions or hardships that deprive the owner of meaningful use of the property.

*Stone v. City of Wilson* (1983) IA. Not a taking when the city rezoned a portion for single-family dwellings only after the plaintiffs had bought property to build multiple-family dwellings. The plaintiffs believed that the area had been rezoned on discriminatory grounds but the city claimed it was out of concern for water conditions and sewage. The court believed that there was not enough evidence to find discrimination and that because the land was not deprived of all economically viable use there was no taking. The court also rejected a vested rights argument finding that the plaintiffs had only taken preliminary steps to construct their multiple-family dwelling (bought land, did some excavations, placed land foundations, contracted with a builder to erect the structure, and brought in construction equipment).

**REGULATORY TAKINGS**

The state is entrusted with the power to both define and defend property rights. A protection to ensure that both of these functions are upheld is found in the 5th Amendment which prohibits the federal government from taking private property for public use without just compensation. This clause has also been read into the 14th Amendment’s due process safeguard on deprivation of property to apply to states.

The state police power encompasses the power of the state to pass laws regulating private conduct to protect public health, safety, and welfare. Eminent domain is the state power to take or condemn private property, giving just compensation to the private owner, then transferring the property to a use designed to further the public welfare.

The takings clause fills the gap for de facto takings of property (i.e. when legislation deprives a private owner of all use of a property because of say new environmental regulations). For this, just compensation is required. **As long as the property is taken for public use, it can be taken with just compensation**. The question is when is compensation required?

There are three elements:

1. a taking
2. for public use [land cannot be taken for private use]
3. without just compensation.

**You will address *precedent* first, then address the *relevant ad hoc factors* (government action, investment expectations, diminution of value), and then analyze the issues of *fairness and justice***.

Just compensation is typically the fair market value of the property. It does not include incidental damages like business moving costs, loss of goodwill, or personal emotional value attachments. If only part of a property is taken, and the remaining property is benefited by the taking, that value is subtracted from the fair market value compensation.

*Mugler v. Kansas* (1887). Court upheld a state law prohibiting the manufacture and sale of alcohol and declared that it was not a taking even though the private owner had a brewery which he had purchased and opened when the sale of alcohol was still legal and the property held little other value. The court believed that where there was a good faith legislation meant to protect the public health and when actual title to the property was retained by the private owner such that his property rights were not divested, there could be no taking.

*Powell v. Pennsylvania* (1888). As long as a law was passed with good faith intent to protect the public health, even if the court deemed the law unwise or unnecessary, there was no taking—even if it deprived the private owner entirely of his means of livelihood.

*Hadacheck v. Sebastian* (1915). As long as a prohibition was designed to protect the community from a noxious use or nuisance, it would not be a taking—even if the use was lawful when first undertaken and even if others came to the nuisance.

*Buchanan v. Warley* (1917). Court founds that an ordinance prohibiting the purchase of property on a street where the majority of houses were owned by persons of another race was unconstitutional. The law was invalid under denial of the due process right to sell property as one sees fit.

*Pennsylvania Coal v. Whalon* (1922). State required coal companies to mine in such a way that would not remove subjacent support from neighboring homes. The court believed that this rule went too far in exceeding the legitimate scope of police power by making it commercially unfeasible to mine coal. This constituted a taking without just compensation.

🡪Before this case, a taking only meant a physical taking of the land or title to the land. This cased added regulations that “go too far” under the takings clause.

*Village of Euclid v. Ambler Realty* (1926). No taking when a zoning law reduced the value of industrial property by 75% when the regulation served a legitimate public interest.

*Nectow v. City of Cambridge* (1928). Court finds that there is a taking when a residentially zoned lot would be reduced from 100 feet to 65 feet wide thereby making it unusable. The court found a taking because the public use stated by the government would not be sufficiently promoted by the rule (the plan could’ve been moved down a few feet, been just as good, and the destruction of this man’s property would’ve been avoided).

*Miller v. Schoene* (1928). No takings when a court ordered infected cedar trees to be cut down to prevent disease from spreading to apple trees. State decided that the apple business was more important and a choice had to be made. If there was no regulation then the apple trees would be lost. This does not violate due process.

*Pennsylvania Central Transportation v. NYC* (1978). Court concludes that a restriction on Penn Station as a historical landmark is not a taking even though it prevents the owner from building a 55-story addition above the station. A restriction on use of the property cannot of itself constitute a taking when the property can continue to be used as it always has been. The loss or impact of a rule is to be assessed as to the property as a whole not just as to specific uses.

***Per-Se/Categorical Takings***

There are only two kinds of categorical takings: a permanent, physical invasion of property by a stranger OR a regulation that deprives the property of all economically viable use. These are applied very narrowly.

*Pruneyard Shopping Center v. Robins* (1980). Court rules that a California law that would require a shopping mall to allow peaceful distribution of pamphlets and petitions is not a taking of the mall’s property right to exclude. The mall can still restrict the time, manner, and place of such peaceful distribution. There will be little to economic impact on the mall’s productivity and this is a legitimate government action to uphold free speech.

Physical Invasion by a Stranger

*Loretto v. Teleprompter Manhattan* (1982). **Court rules that any permanent, physical occupation of property by a stranger is a taking**. In this particular case, it was the installation of cable boxes and wires pursuant to a NY state law requiring landlords to permit such installation for their tenants. The court claimed that **no matter how small the physical invasion, if it was permanent it was a taking regardless of the economic impact on the owner and regardless of any government or public purpose. This infringes on the fundamental right to exclude** and as such it is more severe than regulations on the use of property.

🡪Dissent: the majority has created a very fine distinction between permanent and temporary physical invasions without any reason. Ignoring the public interest and lack of economic detriment or reasonable investment-backed expectations is also silly. How to reconcile this with requirements to installs fire extinguishers, smoke detectors, and mailboxes?

*Pumpelly v. Green Bay* (1872). Statute authorized a company to build a canal that would flood the plaintiff’s land. This was deemed a categorical taking—it would entirely destroy the value of the property, inflict irreparable and permanent harm, and cause total destruction.

*US v. Causby* (1946). There was a taking when military aircraft flew so close over the plaintiff’s land that the chickens he raised on his land flew into the walls killing themselves due to the noise. Technically, there is an airspace servitude that allows flight over all property but this was too low—property owners must have “exclusive control over the immediate reaches of the enveloping atmosphere.”

*Heart of Atlanta* (1964). Commerce clause grants the government the right to force hotel owners to admit guests without discriminatory intent.

*Kaiser Aetna v. US* (1979). An owner bought and developed a shallow, private lagoon so that it would connect to the ocean and then opened a marina and sought to restrict access only to fee-paying members. The government tried to enforce a statute that required navigable waters to be open to the public but the court found that this was a taking. The lagoon was only navigable because of the owner’s investment/expectations to have a private marina. This is different from *Heart of Atlanta* because that case had discriminatory intent.

*Nollan v. California Coastal Commission* (1987). A taking occurred when the city commission tried to condition a property owner’s permit to expand his beachfront home upon a grant of public access to the beach.

The court has also held that tenants may remain in their rent-controlled housing after the expiration of their leases, finding that this is not a taking [*Block*, *Yee*]

Deprivation of Economically Viable Use

*Lucas v. South Carolina Coastal Council* (1992). The state of South Carolina passed a rule prohibiting construction of beachfront property…the plaintiff had purchased beachfront property two years before the law went into effect. The court gets ride of the distinction between non-compensable takings that get rid of public nuisances and compensable takings that confer state benefit because the court believes those are actually the same thing. The question then is whether the prohibited use was already proscribed by nuisance or property law—if not, and if the regulation deprives the property of all economically viable use, then this requires just compensation.

🡪Kennedy Concurrence: The right to compensation must be found on the grounds of reasonable investment expectations

🡪Blackmun Dissent: The state is allowed to take land when there is a harmful use regardless of the economic deprivation to the owner-the legislature should be allowed to define what a harmful use is as they’ve done here. Also, there is still valuable use to this property.

🡪Stevens Dissent: *Mugler* precedent states that taking is not compensable just because the use was lawful when you bought the property.

*Palazzolo v. Rhode Island* (2001). Palazzolo brought waterfront property when a law against its development was already in place. Then, when a state agency denied several of his proposals for developing the land, he sued claiming that there had been a taking. The RI Supreme Court denied the claim finding (1) that it was not ripe because only a few proposals had been denied (2) not all use was gone from the land because there was non-waterfront property that could still be developed (3) and the law had been in place when the property was brought. SCOTUS reversed findings 1 and 3, and reserved finding 2. As to finding 1, the Court believed that the denial of the previous permits was sufficient to show that the state had made a final decision that the land could never be developed. For finding 3, the court believed that this would allow the state to put an expiration date on the takings clause so it could not be invoked by inheritors of land or could not be invoked if it took too many years for a claim to become ripe—besides a state law can be unreasonable no matter when it is passed. The court refused to address issue 2 directly by defining what would constitute a deprivation of all economically viable use (the denominator problem).

*Tahoe-Sierra Preservation Council v. Tahoe Regional Planning Agency* (2002). The court clarifies that a temporary ban on construction (technically a physical taking for the time that the temporary ban lasts) is not a per se taking. The implication would be that any delay in construction (i.e. waiting for a building permit) could be a taking, which simple doesn’t make sense.

***Ad Hoc Test Factors***

Typically SCOTUS will use a three-factor test to determine if there is a taking. This test is fact specific. The three factors are:

1. **Character of the government action**—the purpose or effect of the government i.e. promoting general welfare, preventing harm, destruction, deprivation of physical property, etc.
2. **Interference with reasonable investment-backed expectations**—opportunity loss vs. vested right
3. **Economic impact/diminution in value**—presence of a continuing use that is economically viable with a view to the property as a whole

Cases more likely to be takings under the ad hoc test:

1. Deprivation of certain core property rights or estates in land
2. Retroactive deprivation of vested rights in property where there has been reasonable reliance on the previous regulation
3. Required dedications of property imposed on land use development permits when the restrictions don’t substantially advance the same interests that would allow authorities to deny the permit altogether [exactions]

***Deprivation of Core Property Rights***

*Babbitt v. Youpee* (1997). Court believes that the revised § 207 of the Indian Land Consolidation Act is still unconstitutional. The original section was deemed to rob Indian tribes of their **property right to leave property to their heirs** and this amendment did the same thing. Originally property escheated to the tribe if the property had failed to generate $100 in the five years prior to the owner’s death. Factional interests in the property would automatically escheat to the tribe. The revised section stated that property escheated if it was incapable of generating $100 in the five years after the owner’s death. Factional succession was banned only when the would-be heirs had no previous interest in the land. Such a rule still greatly narrowed the pool of possible heirs which was a core property right. That means this is a taking.

🡪Stevens Dissent: The government has an interest in consolidating these factional interests in land. The plaintiffs had notice and opportunity to consolidate but chose not to. Not a taking.

*Andus v. Allard* (1979). A full ban on the sale of eagle feathers (to protect the endangered species) was not a taking. Where there is a bundle of property rights, it is not unconstitutional to take one strand of that bundle—that doesn’t destroy the whole thing. Here, the owners did not have to physically surrender the feathers so they weren’t totally deprived.

***Vested Rights***

Once an owner substantially invests in reliance on existing zoning laws, there is a vested right. No retroactive changes can be made unless to prevent the owner from harming individuals or from creating a nuisance. Generally once the owner has gotten a building permit ad invested a good deal of money this doctrine will kick in.

*Eastern Enterprises v. Apfel* (1998). Court believes that there was an unconstitutional taking of property when a defunct coal business was required by law to provide additional funds for health benefits for already-retired coal miners, at a rate above the amount they had agreed to pay them before the time of their retirement. A 4 justice plurality believed that the law would have a severe retroactive effect on a group that could not have anticipated the change in the law. The law also was thought to impose disproportionate liability. One more justice joined the plurality to find the law unconstitutional but on the grounds that this was not a taking but merely an unfair retroactive law.

***Public Use***

*Kelo v. City of New London* (2005). The court declares that there is no unconstitutional taking of land where the plaintiffs have owned and lived in their homes for much of their lives but the city has condemned the property so it can be used for an economic rejuvenation project for the city. The argument is that this is not a public use because the property is to be taken over by Pfizer, a private insurance company that is supposed to build a research center. The court finds that **public use is a broad test that means a public purpose (like city rejuvenation); it does not necessarily mean that the property will be open to the public**. There is a need for legislative deference. There is substantial case law to **refute the argument that a purely economic development purpose is inappropriate for a legitimate taking** [case of *Berman v. Parker* allowed a taking of a functional grocery store because it was in a blighted area targeted for city renovation; *Midkiff* reaffirmed this approach even when the homes were not in a blighted area to achieve the public good of increased land ownership]. Finally the **court rejects the idea that there must be assurance that the expected economic benefit will actually accrue before the taking is constitutional—this was seen to be an impermissible impediment to the community’s development**. **No compensation is required** for this taking.

🡪Kennedy Concurrence: Need to make sure that in future cases we do a more searching review to ensure that there has been no private interest favoritism

🡪O’Connor Dissent: This ruling blurs the lines between public and private takings. Unlike earlier cases where the taking itself achieved a public good, this case involves a good that is only achieved through a private party’s economic benefit. It just seems wrong and the legislature gets deference but not unchecked power.

🡪Thomas Dissent: This is not a public use and the majority would obliterate the distinction between public and private use. Public use means that the public has a right to use the property.

Reexamining *Kelo*

Public Use

* Deference to legislature (the question requires policymaking choices which courts shouldn’t do; legislature is politically accountable and the courts are not)
* Economic rejuvenation is a public good [*Berman*]
* There can be public good achieved even when the area isn’t blighted [*Midkiff*]
* If there is no evidence of favoritism this militates in favor of deference (the plan was not designed especially for the benefit of a single company)

Not a Public Use

* No limiting principle (won’t there always be a more profitable use of property tht would justify taking it?)
* Public benefit is marginal and unforeseeable for economic takings
* There is too loose of a public benefit when a private owner receives the taken property (trickle-down theory really doesn’t work)
* Disadvantaged persons are less able to attack such plans and will be habitual losers in these deals
* This is definitely within the purview of the courts, they review laws like this all the time